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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RONALD KEITH MILLER

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE THIRD DISTRICT

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2A. Whether a court may convert a pretextual and an announced stop to search without the requisite probable cause into a temporary detention requiring only founded suspicion in contradiction of **Michigan v. Chesternut**, 108 S.Ct. 1975, 1980 n. 7 (1988)?

2B. Whether the information to search an ice cooler in an automobile justified the search of other closed containers without probable cause in violation of the recent restatement of this rule in **Acevedo v. California**, 111 S.Ct. 1982, 1991 (1991)?

3. Whether on these transportation charges the failure of the court to instruct that the petitioner knew of the presence of the drugs and the prosecutor's exploitation of the error in closing argument was a denial of due process?

4. Whether the statement of the detained petitioner in response to the police announcement of a search required the giving of the **Miranda** warning under **Rhode Island v. Innis**, 446 U.S. 291, 301 (1980).

5. Whether the evidence --an auto with joint access of four persons and drugs found in a duffel bag of unknown ownership -- was sufficient to satisfy a rational fact finder beyond a reasonable doubt of guilt of the petitioner of transportation of drugs under **Jackson v. Virginia**, 443 U.S. 307 (1979)?

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE THIRD DISTRICT

The Petitioner, Ronald Keith Miller, requests that a writ of certiorari be issued to review the judgment of the California Court of Appeal for the Third District because of the accusatory hearsay and confrontation violation, the improper search, the misinstruction on the knowledge requirement of the offense which was exploited by the prosecutor in closing argument, the use of petitioner's unwarned alleged admission after being advised his vehicle

would be searched, and the sufficiency of the evidence, because the judgment below is contrary to the holdings of this court.

OPINION BELOW

The opinion of the California Court of Appeal affirmed the conviction but was not published. A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 1 November 1991 the Court of Appeal entered judgment striking a prior offense and affirming the eight-year sentence conviction of the petitioner for transporting a small amount of cocaine (3.1 ounces (88.13 grams)) and methamphetamine (6.8 ounces (192.88 grams)). On 2 December 1991 his Petition for Rehearing was denied. (Appendix B.) On 11 February 1992 the Supreme Court of California denied his petition for review. (Appendix C). This Court's jurisdiction to review the judgment of the California Court of Appeal is conferred by 28 U.S.C. 1257(a).

STATUTES INVOLVED

California Health and Safety Code section 11379 provided:

> Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who transports . . . , or offers to transport . . ., or attempts to . . . transport any controlled substance which is . . . specified in subdivision (d) . . . of Section 11055 [methamphetamine] . . . shall be punished in the state prison for a period of two, three, or four years.

California Health and Safety Code section 11352(a) provided:

> Except as otherwise provided in this division, every person who transports . . . , or offers to transport . . . , or attempts to . . . transport (1) any controlled substance . . . specified in subdivision (b) . . . of Section 11055 [cocaine] . . . shall be punished by imprisonment in the state prison for three, four, or five years.

STATEMENT OF THE CASE

On 23 October 1988 the police based upon an accusation that petitioner had drugs in the ice cooler in his van stopped the vehicle of the petitioner for the purpose of searching it. The officers searched the ice cooler, but no drugs were found. Then one officer searched a closed duffel bag and discovered drugs in containers within the

duffel bag. The male passenger riding with the petitioner was charged, but the charges were dropped before trial. The passenger did not know who owned the duffel bag. In addition two women had previously accompanied the petitioner and the male passenger and were seen driving the van the morning petitioner was arrested.

Hearsay Question. The accusations of Boyd introduced through the arresting officer were objected to as hearsay, triple hearsay, and irrelevant and a continuing objection was made. (RT 127-130). The court of appeals found the statement to be inadmissible hearsay but harmless and held the Confrontation Clause was not involved because the statement was admitted for a non-hearsay purpose. (App A17-22).

Search Questions. The improper search was raised at the preliminary hearing (8 Nov 88) and pretrial by a motion to suppress, which was denied. (CT 36-39). The search issue was presented to the court of appeal. (App A4-15).

Required Knowledge Question. The requirement that the petitioner have knowledge of the presence of the drugs was raised on appeal, and the court of appeal found that trial defense counsel had not waived the issue. (App A24-27).

Petitioner's Statement Question. At trial defense counsel objected to the statement of the petitioner that the women had drugs too because petitioner was not free to go and it was not a spontaneous statement. (RT 39). The court of appeal reviewed the question but found the statement was not elicited by the police. (App A15-17).

Sufficiency of the Evidence Question. The issue of sufficiency of the evidence was argued to the jury (RT 222-230) and on appeal (App A27-28).

SUPPLEMENTAL STATEMENT OF FACTS

An unpaid and discharged prostitute, Cherylye Boyd, angry at the petitioner Miller, whom she claimed owed her money, reported him to the police. Sergeant Baer responded to her battery complaint, thought it was not

"righteous," did not have enough evidence to arrest the petitioner, and told Boyd and the petitioner to stay away from one another. (RT 34, 125). As the officer was leaving, she twice asked him what it would take to search petitioner's van. (RT 127) She told Sergeant Baer there were drugs in the van and the motel room. (RT 14, 128). Sergeant Baer waited for the van to leave and followed it. (RT 128-129). While following the van he contacted the police dispatcher, who in turn contacted Boyd, "to find out exactly where the drugs were and if there -- in the van itself." (RT 129). The dispatcher then advised that Boyd said "that the drugs were in a cool chest in the van behind the driver's seat between the rear seats" and there was a pistol in the van.[1] (RT 130). Sergeant Baer advised Lt. Sisneros by radio that he was making a "traffic stop" of the van (RT 130-131), but during the time he followed the van

[1] In addition to his continuing objection to the admission of this testimony at the jury trial, defense counsel stated, "Your honor, this is now triple or double hearsay. I'm going to renew any objection as to what someone told dispatch who told someone else." (RT 130).

it did nothing unusual and did not break any traffic laws (RT 140-141).

The petitioner got out of the vehicle and walked back to Baer's patrol unit. (RT 131). At that time Sergeant Baer testified as to what he told the petitioner: "I advised him that we had information that there were drugs in the van, and that I was going to make a search of the van." (RT 131). Sergeant Baer turned over the petitioner to Lieutenant Sisneros, who just arrived on the scene and observed the contact between Sergeant Baer and the petitioner. (RT 131, 150).

As petitioner departed his vehicle, Lieutenant Sisneros told him "that the van was going to be searched and the reason for it." (RT 151). Lieutenant Sisneros testified that the petitioner's response to that comment was, "Well, they're just a couple of whores, they have drugs also," or "they have drugs, too." (RT 152).

Sergeant Baer, on the other hand, testified that the petitioner did not respond at that time, and having turned

over the petitioner to Lieutenant Sisneros, Sergeant Baer asked Wiles, who was in the passenger seat to exit the van. (RT 131). Sergeant Baer testified,

> I pat-searched both individuals down because of the information of the weapon, I told them that I was going to place them in the vehicles for security reasons before we search the van. Mr. Wiles was placed into a department unit which had arrived at the scene,[2] Mr. Miller [petitioner] was placed into my unit. (RT 132).

Sergeant Baer testified that as he was placing the petitioner in the patrol unit, the petitioner said, "You better check the girls because they have heroin and drugs with them, too."[3] (RT 132).

After the petitioner and Wiles had been secured in

[2] Wiles, the passenger in the van when it was stopped, was a prosecution witness at petitioner's jury trial. Wiles testified that Miller had departed the van first, and then the officers took Wiles out of the van, handcuffed him, and threw him in the back of the police car.

[3] This testimony was presented to the jury on the issue of guilt or knowledge that the petitioner was transporting a controlled substance. At the preliminary hearing when the motion to suppress was first heard Sergeant Baer testified that after talking to the petitioner briefly he took him to the rear of his patrol car, at which time the petitioner stated, "You better check those girls too, because they got heroin and drugs in their room too." (RT 40)(Italicized words not contained in the statement attributed to the petitioner at trial).

the patrol vehicles, Lieutenant Sisneros and Sergeant Baer entered the van. (RT 134, 152). Both officers searched the cool chest and found no drugs. (RT 134, 153). Sergeant Baer did not search further, but Lieutenant Sisneros continued the search.[4] (RT 134, 153). Lieutenant Sisneros opened the duffel bag,[5] in which was found four plastic containers, two of which were in a liquor bag, with a powdery substance and a Tupperware container with a small amount of marijuana.[6] (RT 153).

When he found the drugs, Lt. Sisneros brought the van to the Police Department for a more thorough search.

[4] Lieutenant Sisneros at the time of the search did not have knowledge there was a weapon in the vehicle. (RT 157).

[5] At the time of the search no attempt was made to identify who the duffel bag belonged to (RT 156-157), and there was no identification in the duffel bag (RT 169). The duffel bag was not kept. (RT 174). The police checked the containers for the fingerprints of the defendant, Wiles, and DiGiuseppe, but not Boyd, with no positive results. (RT 160-161).

[6] In a Crown Royal bag there were three baggies containing: (1) 48.25 grams of cocaine, (2) 14.18 grams of methamphetamine, and (3) 39.88 grams of cocaine. One double wrapped baggie contained 178.70 grams of methamphetamine, and a tupperware container that had 17 grams of marijuana. (People's Exhibit 3; RT 159). Thus a total of 3.1 ounces (88.13 grams) of cocaine and 6.8 ounces (192.88 grams) of methamphetamine were found in the duffel bag.

(RT 155). Lt. Sisneros secured a warrant for the second search based on the information from Boyd, the stop of the van, and the finding of the contraband. (RT 49). The second search revealed a vial of cocaine (1.23 grams) in a pair of shorts size 38 of the type worn by appellant and a briefcase containing $28,300,[7] which appellant admitted to the officer was his from the sale of his Corvette. (RT 155-6, 172).

In the evening two days before the search and arrest Wiles had picked up Boyd at the Ontario airport. (RT 177). The next day the petitioner and Wiles met in a hotel in San Bernandino and that morning travelled with DiGiuseppe and Boyd to Red Bluff, California. (RT 176-177). The four of them were together for the entire trip, and Wiles testified there was no discussion of drugs on the trip. (RT 178-179). They arrived in Red Bluff between 12:00 and 2:00 AM. That night Wiles, Boyd, and DiGiuseppe used a

[7] A weapon was also found in this briefcase. (RT 157).

little bit of marijuana, which Wiles believed DiGiuseppe had taken from her purse. (RT 183). Wiles stayed alone in his room. (RT 179). Boyd and Digiuseppe took Wiles to the petitioner's room about 7:00 AM., where they had tied up the sleeping petitioner and put mascara on him. (RT 179-180, 185). That morning, before the arrest, Boyd and DiGiuseppe took the van for about a half-hour, while the petitioner was tied up in his room. (RT 185-186). Wiles had no independent knowledge of the duffel bag. (RT 181-182).

After the search of the van, Lieutenant Sisneros returned and searched the hotel room of the petitioner (No. 56) and found no drugs. (RT 170). He searched Wiles' and Boyd's room[8] and found valium. (RT 170).

REASONS FOR THE ALLOWANCE OF THE WRIT

1. THE ADMISSIBILITY OVER OBJECTION OF THE ABSENT ACCUSER'S STATEMENTS OF THE EXISTENCE OF DRUGS IN PETITIONER'S VEHICLE WAS A CRITICAL CONSTITUTIONAL CONFRONTATION VIOLATION AND WAS CONTRARY TO **MOORE v. UNITED STATES**, 429

[8] Sergeant Baer took the report from Boyd alone in Room 60. (RT 122). At the preliminary hearing Boyd testified that she was staying in Wiles room. (RT 51).

U.S. 20 (1976).

Under the Federal and California Constitutions the accused is entitled to confront the witnesses against him. (U.S. Constitution, Fifth Amendment; California Constitution, Article I, Section 15). Boyd's damming comments that petitioner was transporting a controlled substance was presented to the jury as an illusory exception to the hearsay rule.[9] The court of appeal, relying on **People v. Scalzi**, 126 Cal.App.3d 901 (1981), agreed it was a hearsay violation, but held it was harmless in light of other evidence.[10]

This circumstantial case pivoted on the finding of drugs in the petitioner's van. His statement that the police

[9] This case is an example of the criticism of Coke in this Third Institute of "the strange conceit that one may be an accuser by hearsay." Cleary, **McCormick on Evidence** (3d ed 1984) 726.

[10] Wiles, a passenger in the van when it was stopped, and the two women who drove it that morning had ready access to the van in addition to the appellant. The ownership of the duffel bag was never established, other than Boyd, DiGiuseppe, and Wiles using marijuana and marijuana being found in one of the containers in the duffel bag. The court of appeal noted that mere presence and knowledge was insufficient as to the role of Wiles so as not to require the giving of the accomplice instruction. (App A24 n. 13).

better check the girls because they have drugs with them too is unduly expanded, for it contains no expression of the petitioner's knowledge that there were drugs in the van. Boyd's statement that there were drugs in the van was an unequivocal accusation that the petitioner was connected with them and would have much greater impact on the jury than petitioner's own equivocal statement.[11]

In **Ohio v. Roberts** 448 U.S. 56 (1980), this Court in the context of a witness who testified previously set out a two-pronged test for evaluating alleged Confrontation Clause violations. Where a defendant claims an out-of-court statement was received into evidence in violation of the confrontation clause, the record must show that the government produced the declarant or presented facts showing that such person was unavailable. Second, the

[11] In **People v. Scalzi**, **supra**, the appellate court in a case where the evidence was not challenged as insufficient reversed because an unknown female had accused the defendant of "getting it bagged up," which meant packaging drugs. That California court reversed in a case much less toxic than Boyd's repeated accusation that the petitioner of possession and transportation of drugs in his van.

government must prove that the declarant's statements are trustworthy. 448 U.S. 56, 66. In petitioner's case there was no showing of unavailability, but even more important is the complete lack of the "indicia of reliability."

Boyd's out-of-court accusation that the petitioner had drugs in the van was presented to the jury without her presence, a showing of unavailability, or the trustworthiness of those statements. The packaging of her accusation through the more credible police officer was a guise that did not eliminate the protection of the Confrontation Clause. The petitioner was entitled "to be confronted with the witnesses against him," especially the most adverse witness whose reason for making the statements and demeanor needed to be subjected to cross-examination.

The court of appeal found that the excludable hearsay statement "was admitted for a nonhearsay purpose" and, therefore, the Confrontation Clause and **Moore v. United States**, 429 U.S. 20 (1976), were not applicable. (App A21 n. 12). This critical out-of-court accusation was

admitted through a subterfuge (i.e, to show the motivations of the police officer), and then the subterfuge is the basis of a finding of the inapplicability of the Confrontation Clause. There is overlap between hearsay and the Confrontation Clause, but the constitutional provision was to protect a defendant from absent accusers. In this Court's recent decision, **White v. Illinois**, 112 S.Ct. 736 (1992),[12] the majority declined to adopt the suggestion of the Solicitor General to limit the Confrontation Clause to those out-of-court statements made for the principal purpose of accusing or incriminating the defendant. 112 S.Ct. 736, 741. Even under that test or the one suggested by the Solicitor General, the petitioner was entitled to protection, because Boyd was his accuser.

[12] The "sufficient guarantees of reliability" requirement may be met where, for example, the "hearsay" statement falls into the "spontaneous declaration" or "medical examination" exception (**Id.** at 698); the "hearsay" statement was made at an earlier trial where the witness was under oath and subject to cross-examination and the witness is "unavailable" at the time of trial (**Mancusi v. Stubbs**, 408 U.S. 204 (1972); and where the hearsay statement was made during a preliminary examination, by a witness under oath, who was found to be "unavailable" at the time of trial (**Ohio v. Roberts**, 448 U.S. 56 (1980)).

The jury that heard Boyd's accusations was in the same position as the trial judge in **Moore v. United States** 429 U.S. 20 (1976). In a bench trial, which combined the motion to suppress and the trial on the merits of a defendant charged with possession of heroin with the intent to distribute, the prosecution failed to produce proof of the defendant's possession other than his close proximity to the narcotics in an apartment.

In argument the prosecutor referred to an out-of-court declaration of an unidentified informant that the defendant resided in the apartment and possessed a certain amount of heroin. The judge relied on the hearsay declaration that the defendant was an occupant of the apartment over the objection of defense counsel that it was hearsay. The Court held:

> There can be no doubt that the informant's out-of-court declaration that the apartment in question was "Moore's apartment," either as related in the search warrant affidavit or as reiterated in live testimony by

> the police officers, was hearsay and thus inadmissible in evidence on the issue of Moore's guilt. Introduction of this testimony deprived Moore of the opportunity to cross-examine the informant as to exactly what he meant by "Moore's apartment," and what factual basis, if any, there was for believing that Moore was a tenant or regular resident there. Moore was similarly deprived of the chance to show that the witness' recollection was erroneous or that he was not credible. The informant's declaration falls within no exception to the hearsay rule recognized in the Federal Rules of Evidence, and reliance on this hearsay statement in determining petitioner's guilt or innocence was error. 429 U.S. at 21-22.

The criminal conviction was summarily reversed without oral argument. 429 U.S. at 23. In a combined hearing the judge is ordinarily considered capable of distinguishing admissible from inadmissible evidence, and reviewing courts ordinarily find that the inadmissible is not considered. However, in **Moore** the judge, like the jury in the

instant case, heard and relied on the informant's out-of-court statements, which compelled reversal.

Because there has been a violation of confrontation, the test for error is harmless beyond a reasonable doubt. **Coy v. Iowa**, 108 S.Ct. 2798, 2803 (1988). Curative instructions did not remove the indelible injury. **Bruton v. United States**, 391 U.S. 123 (1968)(jury instruction did not remove prejudice from admission of a co-defendant's confession). With multiple access to the van the case against the defendant was totally circumstantial, and his own ambiguous statement did not off-set Boyd's out-of-court most condemning accusation.

This Court must clarify the confrontation requirements for allegedly "nonhearsay" statements regularly made by police officers. The hornbook, Cleary, **McCormick on Evidence** 734 (3d ed 1984), warned against the tactic used in this case:

> However, one area of apparently widespread abuse should be noted. In criminal cases, an arresting or investigating officer should not be

> put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct. His testimony that he acted "upon information received," or words to that effect, should be sufficient. Nevertheless, cases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.[13] (Emphasis added).

This court must establish that the principles of confrontation apply in this context and that California courts must follow this principle as enunciated in **Moore v. United States**, 429 U.S. 20 (1976).

2A. A COURT MAY NOT CONVERT A PRETEXTUAL AND AN ANNOUNCED STOP TO SEARCH WITHOUT THE REQUISITE PROBABLE CAUSE INTO A TEMPORARY DETENTION REQUIRING ONLY FOUNDED SUSPICION IN CONTRADICTION OF **MICHIGAN v. CHESTERNUT**, 108 S.CT. 1975, 1980 n. 7 (1988).

[13] Federal appellate courts have regularly found such evidence to be irrelevant and inadmissible to the determination of guilt. **See** e.g., **United States v. Lamberty**, 778 F.2d 59, 61 (1st Cir. 1985); **United States v. Taylor**, 900 F.2d 779 (4th cir. 1990); **United States v, Brown**, 767 F.2d 1078 (4th Cir. 1985); **United States v. Hernandez**, 750 F.2d 1256 (5th Cir. 1985); **United States v. Escobar**, 674 F.2d 469 (5th Cir. 1982).

The petitioner was "seized" when his van was stopped. The nature and the time of the seizure are at issue. A seizure to search requires probable cause; a **Terry**[14] stop to momentarily investigate the status quo requires the lesser standard of a founded or reasonable suspicion that a crime is being or about to be committed.[15] To save this patent pretextual traffic stop the court of appeal incorrectly characterized the deliberate stop to search, which required probable cause, as a brief investigatory detention, which required only the lesser standard of founded suspicion. This record is unequivocal and the court of appeal so found that the traffic stop was without foundation and the officers stopped the petitioner with the

[14] **Terry v. Ohio**, 392 U.S. 1 (1967).

[15] "Although the Fourth Amendment may permit the detention for a brief period of property on the basis of only 'reasonable, articuable suspicion' that it contains contraband or evidence of criminal activity, **United States v. Place**, 462 U.S. 696, 702, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983), it proscribes -- except in certain well-defined circumstances -- the search of property unless accomplished pursuant to judicial warrant issued upon probable cause." **Smith v. Ohio** (1990) 110 S.Ct. 1288. The U.S. Supreme Court with respect to automobiles has created an exception to the warrant requirement for automobiles, but not the probable cause requirement.

announced intent of searching his vehicle.[16] This was a pretextual traffic stop although the officers had already made up their minds to search the vehicle for drugs and so announced their purpose to the petitioner at the outset of their contact with him. They wove a traffic stop a shield to mask the true purpose to stop and search the vehicle for drugs.[17] The term "pretext" is defined: "a purpose of motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." **Webster's Ninth New Collegiate Dictionary** 932 (1984). The officers contrived the reason for the stop, which was false. Once

[16] Twice the court of appeal rejected the unchallenged statements of the officers for the stop: (1)the officer stated it was a traffic stop without foundation; the court of appeal held the first announced purpose of the stop was irrelevant; (2) both officers stated the petitioner's vehicle was stop for the purpose of searching it and so told the petitioner; the court of appeal characterized this intervention as a momentary detention for purposes of investigation. Twice the court of appeals found the officers misstated themselves about the reason for their conduct -- the officers were not being honest when they said what they did. The court of appeal to justify the stop and search had to say the officers were engaged in a judicially approved "pretext."

[17] The term "pretext" comes from the Latin word "praetextus," which means "to weave in front." **Webster's Ninth New Collegiate Dictionary** 932 (1984).

the stop occurred, the officers announced their true purpose, and the seizure requiring probable cause was complete. The court of appeal disregarded the improper traffic stop, because the officers had founded suspicion for the stop. Although the officers immediately announced their purpose to search, the court of appeal disregarded these statements and the actions of the officers in placing the petitioner and the passenger Wiles in their patrol vehicles.

The stop of the van as a "traffic stop" was patently pretextual. The officers had no basis for a traffic stop because the officer noted that the vehicle had not violated any traffic laws. See App A6, n. 4; A10. The officers communicated among themselves that it was a traffic stop and candidly admitted in court that it was the then articulated basis for the stop.

Here the officers admitted their stated reason for the stop was false. Police officers should be accountable for their statements at the time of the stop, for the danger is

great that the reasons for the stop will be later reconstructed in court so as to justify the stop and search. Since the stated reasons of the officers for the stop were admittedly false, courts must require at the outset of the stop at least objective probable cause for the stop, detention of the petitioner, and the subsequent search. In upholding the State and Federal Constitutions, courts must discourage rather than tolerate pretextual searches.

Although falsely characterizing the stop as a "traffic stop," the officers stopped with the unequivocal and articulated intent to search the vehicle. As soon as the petitioner approached the officers, both of them expressly announced that the purpose of the stop was to search the van for drugs. The stop was not made for a brief momentary detention to acquire information, and because the officers did not have probable cause[18] to make the stop

[18] The biased, antagonistic, and unreliable generalizations of the unhappy hooker Boyd, uncorroborated and unsupported by a basis of knowledge or her veracity, never rose to the level of probable cause. At the 1538.5 suppression hearing the Superior Court held her statements would justify a brief detention, but not a search, and found

to search or arrest, the court should not seek in Procrustean fashion to remold the facts surrounding stop to make it something less than what the officers considered it and so told the petitioner.

The seizure of the vehicle and its occupants occurred when the car was stopped for the announced purpose of searching it. Both officers, reinforcing one another and leaving no doubt, announced that the purpose and the nature of the stop was to search the vehicle, and both the petitioner and Wiles were not free to go. Probable cause for that search must have preceded this stop of the vehicle or must have existed prior to their announcement of the intent to search.

The court of appeal mistakenly held that the intent of the officers to search was irrelevant and relied on **Scott v. United States**, 436 U.S. 128, 138 (1978) (reviewing the duty by statute of federal officers to minimize a wiretap), in

probable cause to search from the petitioner's statement that the girls had drugs too after he had been stopped. (CR 38).

holding that the state of mind of the officer does not invalidate the action taken "as long as the circumstances viewed objectively justify that action." (Appendix A11). Whether the police stop an individual for a normal encounter or contact, a brief detention under **Terry v. Ohio**, or arrest directly depends upon the state of mind of the officer.

Two recent cases of this court emphasize that it is the point of intervention ("seizure") and communicated police purpose which control. In **Michigan v. Chesternut** 108 S.Ct. 1975 (1988), the police cruiser quickly caught up to and drove along side the defendant for a short distance, and the court noted the officer testified that they followed him only "to see where he was going." That intent of the officer was critical to the determination there had been no seizure:

> As Officer Peltier explained, the goal of the "chase" was not to capture respondent, but "to see where he was going." Of course, the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct

> only to the extent that that intent has been conveyed to the person confronted. 108 S.Ct. at 1980 n. 7. (Emphasis added.)

When the petitioner Miller was stopped, both officers told him the stop had been made because they were going to search the vehicle. (RT 131, 151). The stop which from the outset was made for the purpose of a search of the auto then had to be justified by probable cause, which it was not.

In **Smith v. Ohio** 110 S.Ct. 1288 (1990), this court summarily reversed a conviction in which an officer confronted a citizen, asked about the contents of a bag, opened the bag and discovered drug paraphernalia. The lower court had found that the defendant was not arrested until after the contraband was discovered. The court held:

> That reasoning, however, "justifying the arrest by the search and at the same time . . . the search by the arrest," just "will not do." 110 S.Ct. at 1290.

The detention or deprivation of liberty had occurred when the individual was stopped, and the results of that improper stop could not justify the search. The ambiguous state-

ment made by petitioner Miller that the prostitutes had drugs was a product of the illegal stop to search which lacked probable cause, and it could not be used to "bootstrap" a justification for the search of the vehicle. That statement, the search of the van, and the subsequent search of the van with a warrant were all "tainted" by the original unlawful stop.

2B. THE INFORMATION TO SEARCH AN ICE COOLER IN AN AUTOMOBILE DID NOT JUSTIFY THE SEARCH OF OTHER CLOSED CONTAINERS WITHOUT PROBABLE CAUSE, AND THIS SEARCH VIOLATED THE RECENT RESTATEMENT OF THIS RULE IN **ACEVEDO v. CALIFORNIA**, 111 S.CT. 1982, 1991 (1991).

The police officers had information that the drugs were in a specific container, the ice cooler. Even assuming probable cause, there was no justification to search the duffel bag and the containers within it. The statement of the petitioner added nothing more about the existence of drugs in the vehicle. Also, because the statement was made by a suspect in custody without a **Miranda** warning, it should not have been considered either for the purposes

of the search or on the issue of guilt, discussed below.

In **California v. Acevedo**, 111 S.Ct. 1982 (1991), this court held:

> The facts in the record reveal that the police did not have probable cause to believe the contraband was hidden in any other part of the vehicle and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment. 111 S.Ct. at 1991.[19]

Ms. Boyd's statement that drugs existed in the cool chest was in response to a police inquiry to determine the particular basis for the accusation, which, consequently, narrowed the scope of the acceptable or reasonable intrusion. When drugs were not found in that particularly described container, the police lacked a basis for a greater intrusion, i.e. the opening of the duffel bag and the search of the containers therein. The petitioner's statement did

[19] In **California v. Acevedo**, 111 S.Ct. 1982 (1991), this court held that a warrant was not required to search a specific container in a vehicle, when there was probable cause to believe it contained narcotics. In **Acevedo**, this court reaffirmed the language in **United States v. Ross** (1982) 456 U.S. 798, 824: "Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." 111 S.Ct. at 1991.

not enhance the previous accusation of Boyd and did not permit a more expansive search. A search cannot be justified by what it produces. Sergeant Baer as a responsible police officer terminated the search when the cool chest contained no drugs. That was the extent of his authority, and the failure to find drugs eliminated the plausibility of the information on which he based his search. Lieutenant Sisneros continued the search into a separate container, the duffel bag, and the containers within it without a basis for doing so. The prohibition against open-ended general warrants applies as well to warrantless auto searches. The probable cause defined the authority to search and was limited to the ice cooler.

Searches of autos in which there are suspected containers of contraband is not an "open sesame" for the search of the whole auto. This constitutional limitation recently re-articulated in **California v. Acevedo** is an important legal issue, and given the volume and frequency of auto searches makes this a question warranting review.

3. ON THESE TRANSPORTATION CHARGES THE FAILURE OF THE COURT TO INSTRUCT THAT THE PETITIONER MUST KNOW OF THE PRESENCE OF THE DRUGS AND THE PROSECUTOR'S EXPLOITATION OF THE ERROR IN CLOSING ARGUMENT WAS A DENIAL OF DUE PROCESS.

"Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] an evil-doing hand. . . .'" (**United States v. Bailey**, 444 U.S. 394, 402 (1980), citing **Morisette v. United States, infra**, 342 U.S. at 251). The most critical issue in this case was the petitioner's knowledge of the presence of the drugs found in the van. The trial judge failed to instruct on this essential element and instructed only on the petitioner's knowledge of the nature of the drugs found in the van. This critical deficiency was then exploited and aggravated by the prosecutor in closing argument when he told the jury that the jury instructions only required that they find the petitioner had knowledge of the **nature** of the drug but not knowledge of its **presence**.

For both counts the court instructed the jury:

> In order to prove such crime, each of the following elements must be proved: (1) A person transported cocaine (methamphetamine), a controlled substance, (2) Such person had knowledge of its nature as a controlled substance, (3) That the substance transported was in an amount to be used as a controlled substance.[20] (RT 244-245). (Emphasis added.)

The prosecutor, in summarizing this instruction to the jury, compounded the error. He skillfully used the failure of the judge to require "knowledge of the presence of the drug" to argue that he need only prove transportation and knowledge of the nature of the substance:

> Listen to the second one and listen how it reads: Such person had knowledge of its nature as a controlled substance, that's the second element. The nature of cocaine, each one of us knows what cocaine is. The nature of the substance, ladies and gentlemen, not the presence of the substance, but the

[20] The instruction, with the addition of usable quantity, followed an outdated format of CALJIC 12.02.

> nature of the substance, and the substance transported was an amount sufficient to be used as a usable substance. (RT 233). (Emphasis added.)

Defense counsel cannot be faulted for not specifically objecting to the prosecutor's quoting from a bad jury instruction, when it was the responsibility of the court to give a proper instruction on the key element of the case. The trial court rejected defense counsel's request for specific intent instructions and mental state on the transportation issue (RT 194), and was thus alerted to the issue.[21]

Permitting conviction of petitioner for the offense of transportation without requiring knowledge of the presence of the drugs is unconstitutional, either as violation of due process or a denial of equal protection of the laws, since conviction for other drug offenses requires knowledge of the drug's presence. As stated in **In re Winship**, 397 U.S.

[21] The court of appeal observed that the instruction issue on knowledge was not waived by defense counsel. (App A25 n. 14).

358, 364 (1970), "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt **of every fact** necessary to constitute the crime with which he is charged." (Emphasis added).

Federal case law has consistently held failure to properly instruct the jury on an essential element to be reversible error. Cf. **Morissette v. United States**, 342 U.S. 246 (1952) (salvager could not be convicted of criminal conversion absent a jury finding of knowledge or intent); **United States v. United States Gypsum Co.**, 438 U.S. 422, (1978) (conviction of defendants for price-fixing in violation of Sherman Act required jury finding that the defendants had knowledge of the anticipated consequences of their actions. The guilty verdicts, obtained after the jury was instructed that if the result of the defendants actions was fixed pricing, the defendants were "presumed, **as a matter of law**, to have intended that result," were reversed and remanded (emphasis in original)); **Sand-**

strom v. Montana, 442 U.S. 510 (1979) (reversing state conviction, previously affirmed by state supreme court, for deliberate homicide. Statute required finding of purposeful or knowing commission of the crime. Jury instruction that "[t]he law presumes that a person intends the natural consequences of his voluntary act," removed the "intent" issue from jury consideration).[22]

"An essential element of the offense is 'Knowledge by the defendant of both the presence of the drug and its narcotic character.'" **People v. Rogers**, 5 Cal.3d 129, 133 (1971), citing **Rideout v. Superior Court**, 67 Cal.2d 471, 474 (1967).[23] Because the trial court in **Rogers** did not

[22] Ninth Circuit case law has also consistently applied this rule: **Tampua v. Shimoda**, 796 F.2d 261 (1986); **U.S. v. Combs**, 762 F.2d 1343 (1985); **In re Hamilton**, 721 F.2d 1193 (1983); **U.S. v. Herbert**, 698 F.2d 981 (1981); **U.S. v. Brooksby**, 688 F.2d 1102 (1982); **U.S. v. Skeet**, 665 F.2d 983 (1982).

[23] This 1989 change to CALJIC 12.02 merely incorporated well established precedent, for the advisory note referred to **Rideout v. Superior Court**, 67 Cal.2d 471 (1967).

sua sponte give the requisite instructions on knowledge[24] and it was reasonably probable that a result more favorable to the defendant would have been reached had proper instructions been given, the judgment was reversed. 5 Cal.3d 129, 137-9.

Knowledge that the duffel bag contained cocaine and methamphetamine was the essential issue.[25] Neither petitioner nor the two women who used the vehicle that morning testified at trial, and Wiles denied any knowledge of the duffel bag. If he, the passenger, did not notice it, it

[24] "Here the principle of knowledge was 'commonly or closely and openly connected with the facts of the case before the court,' and the court was therefore required to give an instruction regarding knowledge sua sponte." **People v. Rogers**, 5 Cal.3d 129, 137 (1971).

[25] Since the jury found petitioner guilty on Count I (methamphetamine) and Count II (cocaine), they found transportation of the duffel bag, which contained both controlled substances. Count II could be applicable not only to the cocaine in the duffle bag but also the small amount of cocaine found in the shorts. The cocaine count could not be sustained on the basis of the cocaine in the shorts, because there was no showing that the verdict was a unanimous agreement as to the cocaine in the duffel or in the shorts. The problem of several acts being the subject of a single criminal pleading was recognized by this particular court of appeal, which has held that the jury must agree on the particular act in order to convict. **People v. McNeill**, 112 Cal.App.3d 330, 334-6 (1980). This defect not only undermines the cocaine charge itself, but also precludes use of the cocaine found in the shorts as an independent basis to sustain this count.

may have been equally true that petitioner, the driver, was not aware of its presence. Petitioner could have had knowledge of the nature of the controlled substances once they were open to view, but he could have previously been unaware of the presence of the bag and its contents. The prosecutor expressly exploited this possible defense by telling the jury it was not an issue under the instructions given by the judge. Petitioner's defense was that the proof failed to show that the duffel bag did not belong to the girls, but the jury was advised that this was not for their consideration. If the jury had been instructed that the issue was knowledge of the presence of the duffel bag and its contents, then it is reasonably probable that a verdict more favorable to appellant would have been reached by the jury.

The court of appeal confused the requirement for knowledge of the nature of the drug with knowledge of its presence. The court of appeal misunderstood and permitted a finding of knowledge of the nature to be substituted

for the requisite knowledge of the drug's presnece when it stated:

> Thus, although the jury was not separately instructed defendant had to be aware of the presence of the drugs in his van, it was instructed it must find defendant knowingly transported the contraband. (App A26).

The instruction to the jury was "with knowledge of its nature as a controlled substance." (RT 244-245). The court of appeal equated "knowledge of its nature as a controlled substance" as equivalent to "knowing transportation." The prejudice of the failure to give the second prong was aggravated by the emphasis on this error by the prosecutor during closing argument.

Without the requirement of a culpable state of mind, the offense of transportation without knowledge of the presence of the drugs would be unconstitutional either as violation of due process or a denial of equal protection of the laws in that other drug offenses require knowledge of

the drugs presence.[26] Cf. **Morissette v. United States**, 342 U.S. 246 (1952)(salvager could not be convicted of criminal conversion without knowledge or intent).

The failure to give this essential instruction going to the heart of the determination of guilt and exploited by the prosecutor in argument requires review and reversal by this court.

4. THE STATEMENT OF THE DETAINED DEFENDANT IN RESPONSE TO THE ANNOUNCEMENT TO SEARCH WAS NOT A SPONTANEOUS STATEMENT AND REQUIRED THE GIVING OF THE **MIRANDA** WARNING UNDER **RHODE ISLAND v INNIS** 446 U.S. 291, 301 (1980).

In **Rhode Island v. Innis**, 446 U.S. 291, 301 (1980), this court held:

> That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally

[26] In **Carella v. California**, 109 S.Ct. 2419, 2420 (1986), this court stated: "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. **In re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed2d 368 (1970). Jury instructions relieving States of this burden violate a defendant's due process rights."

> attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating[27] response from the suspect.

The prosecutor specifically sought appellant's "response to the comment [Lt. Sisneros was going to search the van]", and Lt. Sisneros characterized it as a "response." (RT 151-2). The officer expected a response and got one.[28]

The court of appeal carved an open-ended and unauthorized exception to **Rhode Island v. Innis**, when it acknowledged that a detained defendant's response is

[27] "By 'incriminating response' we refer to any response -- whether inculpatory or exculpatory -- that the prosecution may seek to introduce at trial." 446 U.S. 291, 301 n.5.

[28] In closing argument the prosecutor himself acknowledged that the warning of the search was expected to trigger a response:

> And, you know, there's a very important point I want you to keep in mind. What did Mr. Miller say that both officers heard when he approached them and said that "We're going to search your vehicle for drugs?
>
> "Why don't you check the girls, they have drugs too." Both the officers said that "drugs, too"; he could say I have drugs, they've got drugs; was he aware that they were there. (RT 221).

admissible if police statements "are no more than a legitimate explanatory comment." (App A17). The statement of intent to search one's vehicle directed at the petitioner, establishing the power of the police over him and his vehicle, is most likely to trigger an incriminatory response. The contours of **Innis** should be defined by this court.

5. THE EVIDENCE -- AN AUTO WITH JOINT ACCESS OF FOUR PERSONS AND DRUGS FOUND IN A DUFFEL BAG OF UNKNOWN OWNERSHIP -- THE EVIDENCE WAS INSUFFICIENT TO SATISFY A RATIONAL FACT FINDER BEYOND A REASONABLE DOUBT OF GUILT OF THE PETITIONER OF TRANSPORTATION OF DRUGS UNDER **JACKSON v. VIRGINIA**, 443 U.S. 307 (1979).

The critical issue was petitioner's knowledge of the presence of the duffel bag and its contents in his van. Wiles, the male passenger, one of the four who had use and access to the van, testified he was unaware of it. However, Wiles also gave unrefuted exonerating testimony that petitioner was the only one of the four who did not use drugs or discuss them on the trip. (RT 178-179, 187). The

other three smoked a marijuana cigarette, and DiGiuseppe appeared to be under the influence. The morning before the petitioner drove off in the van it had been driven by the two women, and Boyd had a grudge against him. The duffel bag was not saved for trial nor were its contents other than the drugs. No positive identification was made of any fingerprints found on the baggies in the duffel bag, and Boyd's fingerprints were never submitted for a comparison. Boyd, who had been called as a witness at the preliminary examination, was not called as a witness at trial so as to eliminate herself as the source of the drugs. By not calling her or DiGiuseppe as witnesses, the prosecutor asked the jury to speculate, or worse, implicitly relied on the hearsay accusation of Boyd to substitute for her presence. The person with the least nexus to drugs was convicted.

Given the state of the evidence there was insufficient evidence to justify a rational finder of facts to find guilt beyond a reasonable doubt. **Jackson v. Virginia**, 443

U.S. 307 (1979).[29]

CONCLUSION

For the reasons set forth above Ronald Keith Miller requests that this court grant the petition for writ of certiorari and set the case for briefing and oral argument. In the alternative, it is requested that this court grant certiorari, vacate the judgment, and remand to the court of appeal:

1. For reconsideration in light of **Moore v. United States** 429 U.S. 20 (1976), and

2. For reconsideration in light of **Michigan v. Chesternut** 108 S.Ct. 1975 (1988), and **California v. Acevedo**, 111 S.Ct. 1982 (1991).

Respectfully submitted,

DATED: 5 May 1992

JOHN J. CLEARY
Attorney for Petitioner
Ronald Keith Miller

[29] See also **Carella v. California**, 109 S.Ct. 2419, 2420 (1989), in footnote 24, **supra**.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD DISTRICT

(Tehama)

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THE PEOPLE, Plaintiff and Respondent, v. RONALD KEITH MILLER, Defendant and Appellant.	3 Crim. C007967 (Super.Ct.No. 4663) **FILED** NOV - 1 1991 Court of Appeal-Third District ROBERT L. LISTON, Clerk By _____, Deputy

Following a bifurcated trial, defendant was convicted by a jury of two counts of transportation of a controlled substance.[1] Allegations of two prior felony narcotics

[1] Count I, transporting methamphetamine in violation of Health and Safety Code section 11379, and count II, transporting cocaine in violation of Health and Safety Code section 11352.

convictions of possession of a controlled substance for sale were found to be true.[2] (Health and Safety Code sections 11370.2, 11351.)[3] A probation ineligibility allegation for a prior narcotics conviction was also charged (prior conviction under section 11351 within the meaning of section 11370). Defendant was sentenced to a total term of nine years (the upper term of five years for the principal term in count II, a concurrent three year term for count I, two consecutive three-year terms under section 11370.2, with two years of the second enhancement stayed).

Defendant appeals, raising six contentions: (1) the searches of his van were illegal; (2) the statement he made after his vehicle was stopped is inadmissible; (3) he was

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[2] As to count I, the Information charged a prior conviction under section 11351 on June 19, 1978, in Los Angeles, and a second prior conviction on March 17, 1978, in Anchorage, Alaska, for a violation of Title 21, United States Code, section 841, subdivision (a) (1). Both allegations were charged within the meaning of section 11370.2, subdivision (c). The same special allegations were charged as to count II under subdivision (a).

[3] All statutory references are to the Health and Safety Code unless otherwise indicated.

denied the right to confront an accusing witness; (4) the trial court committed instructional error in two instances; (5) the evidence is insufficient to support his convictions; and (6) his sentence was incorrectly enhanced for a federal conviction. We shall modify the sentence and affirm the judgment.

FACTS

On October 22, 1988, defendant, Robert Wiles, Carla DiGiuseppe, and Cheryl Boyd left San Bernadino and traveled together in defendant's van to Red Bluff. The following morning Officer Baer of the Red Bluff Police responded to a reported battery at the Lamplighter Inn. After determining the incident was a mutual confrontation between Boyd and defendant, Baer ordered them to stay away from each other. As Baer was leaving, Boyd told him there were drugs in defendant's van and motel room, and a gun was in the van.

Baer followed the van and effected a stop. A search of the van yielded five containers of contraband. The van

was transported to the police station and a search warrant obtained in order to more thoroughly search the vehicle. The latter search yielded two briefcases. The one belonging to Wiles contained a little over one thousand dollars in cash, the one belonging to defendant contained twenty-eight thousand dollars and several pills, possibly Valium. A vial containing a powder substance was found in a pair of men's shorts. Defendant told the police the money was from the sale of a Corvette. Wiles denied any knowledge of drugs except the small amount of marijuana found in a Tupperware container. Ultimately, everyone but Boyd was arrested.

DISCUSSION

Search of the Van

At the preliminary hearing, and in the superior court, defendant challenged both the warrantless search of his vehicle and the subsequent search pursuant to the search warrant. (Pen. Code, § 1538.5) He argued the initial search was based on the information provided from Boyd

who was an unreliable, untested informant with a grudge against him. He further argued that even if the stop and search were valid initially, once Boyd's information about the location of the contraband proved to be wrong, probable cause to search, if any, dissipated. Defendant also challenged the evidence obtained from the search pursuant to the warrant on the ground that the affidavit was predicated on the information obtained from Boyd and the fruits of the initial illegal search.

Viewed in the light most favorable to the order denying suppression (People v. Leyba (1981) 29 Cal.3d. 591, 596-597), the record of the suppression hearing conducted during the preliminary examination establishes that Officer Baer, a member of the police force for 29 years, responded to room number 60 at about 10:45 a.m. Boyd told him defendant had hit her in the chest and she asked Baer to assist her in getting the $1500.00 she claimed defendant owed her. Baer, accompanied by Boyd, went to room 56 where DiGiuseppe answered the door. She appeared to

be under the influence of a drug and smelled slightly of alcohol. Defendant had just finished showering and was in the process of packing. Wiles arrived while everyone was in room 56. He commented that Boyd was a "hooker."

Baer returned to his vehicle after ordering Boyd and defendant to stay away from each other. Boyd asked him what it would take for him to search appellant's van which she described. She told him there was one to three pounds of crank in the van and in the motel room. Baer confirmed the van belonged to defendant, parked across the street where he could view the motel exit, and radioed for back-up. While following the van, Baer learned through dispatch contact with Boyd that the drugs were in a cooler between the rear seats and there was a weapon in the vehicle.

Baer followed defendant for about one mile, and then stopped the van for the purpose of searching it.[4] After

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[4] Although the testimony refers to a traffic stop, defendant did not violate any traffic laws.

informing defendant of the purpose of the stop, and before commencing the search, defendant said, "You better check those girls too, because they got heroin and drugs in their room too." During the search drugs were found in containers inside a duffel bag which Sisneros opened, not in the cooler as Boyd had said. The van was secured and a search warrant obtained. The search pursuant to the warrant yielded the money in the briefcases and the vial in the men's shorts found on the floorboard.

The magistrate denied the suppression motion, holding the stop of the van was valid as an investigatory detention based on the information provided by Boyd. The magistrate determined that Boyd was akin to a citizen informant and reliable even though she was motivated by anger. He based this determination on the circumstances which suggested she had close contact with the people involved and the information she provided was extremely fresh. Additionally, one of the people connected with the van, Carla, was under the influence of a controlled

substance. Furthermore, although the drugs were not found in the ice chest, there was an ice chest in the van. Expressing the issue as whether there was probable cause to search the vehicle on the reasonable belief there was contraband in it, not whether defendant possessed the contraband, the magistrate held that the initial search of the van was legal.

"In reviewing an order denying a motion to suppress, we defer to the fact-finding of the trial court if there is substantial evidence to support it. (People v. Leyba, supra, 29 Cal.3d 591, 596-597.) However, we are not bound by the substantial evidence standard in reviewing the trial court's decision whether or not a search or detention was reasonable; instead it is '"the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness."' (Id. at p. 597.)" (People v. Shields (1988) 205 Cal.App.3d 1065,

1070.)[5]

"[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include the specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question." (In re Tony C. (1978) 21 Cal.3d 888, 893.)

The situation presented to Officer Baer at the time he

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[5] The motion to suppress made in superior court was submitted on the preliminary hearing transcript. (Pen. Code, § 1538.5, subd. (i).)

Defendant's recitation of the facts pertinent to the search and seizure issue raised herein includes facts adduced at trial. These facts were not considered by the magistrate who originally ruled on defendant's motion to suppress.

stopped defendant's van was that there was contraband and a weapon in the van and defendant had recently been with a woman who was under the influence of a drug. Although the driver of the van did not violate any traffic laws and the occupants were not acting in a suspicious manner, the circumstances nevertheless justified the detention for investigative purposes. (See People v. Huff (1978) 83 Cal.App.3d 549, 557.) Additionally, Officer Baer was justified in relying on the information provided by Boyd, notwithstanding her motivation, because "'the tip' which triggers investigative action, unlike that which creates grounds for arrest, need not come from a source of proven reliability." (People v. Superior Court (McBride) (1981) 122 Cal.App.3d 156, 163.) Defendant contends the subject intent of the officer to stop the van for purposes of searching it, and that announced purpose, is controlling in determining the reasonableness of his actions. Defendant thus argues his statement and the contraband are suppressible as fruits of the illegal stop. (Wong Sun v.

United States (1963) 371 U.S. 471 [9 L.Ed.2d 441.].)

"[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, vertify the action." (Scott v. United States (1978) 436 U.S. 128, 138 [56 L.Ed.2d 168, 178]; People v. Gonzalez (1989) 216 Cal.App.3d 1185, 1190.) The trial court did not abuse its discretion in deciding on its own motion to permit the prosecutor to present additional evidence concerning the validity of the search and seizure.

That Officer Baer had reasonable cause to detain defendant does not establish his entitlement to search the van, a necessary requisite of which was the existence of probable cause. Thus the question is: had the facts been presented to a magistrate could a practical common sense decision have been made that, under all the circumstances, there was a fair probability contraband would have been found in the van? (People v. Ramirez (1984) 162

Cal.App.3d 70, 74.)

After defendant left his vehicle and was told the purpose of the stop, and before the search began, defendant told Officer Baer he should check Boyd's and Carla's room because they had drugs too. This statement provided Baer with the missing justification for the search. It objectively implied defendant's awareness of the presence of contraband in his van. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (United States v. Ross (1982) 456 U.S. 798, 825, [72 L.Ed.2d 572, 594].)[6]

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[6] Defendant argues that under People v. Acevedo (1991) 500 U.S. ____ [114 L.Ed.2d 619], probable cause to search, if any, was restricted to the ice cooler.

In Acevedo the United States Supreme Court reaffirmed that probable cause to believe a container in the trunk of a car contains contraband does not justify a search of the entire vehicle. (114 L.Ed.2d at p. 634)

In contrast to Acevedo the police here did not have probable cause to believe there was contraband in the van until defendant made his statement the woman had drugs too. Thus, the probable cause was provided by defendant and was not restricted in any way by his statement, or limited by Boyd's information. To the contrary, it was global and permitted a search of the entire vehicle.

The magistrate correctly concluded that probable cause supported the warrantless search of the van and its contents, including the duffel bag.

Defendant places great reliance on People v. Lissauer (1985) 169 Cal.App.3d 413, in support of his argument the search was illegal. Lissauer, however, is distinguishable: An informant with a criminal record was found in possession of controlled substances. Four or five days before the defendant's arrest the informant, although not officially under arrest, was made to "work" for Officer Santos. The informant told Santos a man named Larry would be delivering 10 pounds of marijuana to an unknown apartment in San Francisco, and the marijuana would be in the back seat of Larry's car in a shoulder bag, brown paper bags, or a duffel bag. The informant provided a phone number for Larry but no address. Larry's car was descried as a newer model two-door sedan. Larry was described as an older gentleman, balding, black hair, about five-nine and 150-160 pounds.

Officer Santos obtained the address corresponding to the telephone number provided and the license plate number of the vehicle registered to Larry. On the day the delivery was to occur a surveillance team followed the vehicle which was intercepted and pulled over in San Francisco. Officer Roche testified that when he approached the car he saw marijuana protruding from an open bag on the back seat. He ordered the defendant out at gun point and arrested him, and proceeded to search the trunk of the vehicle. At the suppression hearing the court specifically rejected Roche's testimony and found the marijuana was not visible when he approached. Thus, the defendant was stopped and arrested at gunpoint on the basis of the informant information, and the search flowed from the arrest. (Id. at pp. 417-419.)

On appeal the court held that the initial stop was justified for purposes of investigation, but the police did not have probable cause to arrest. Therefore the search was illegal. (Id. at pp. 420-424.) In the instant case the

information was provided by a person who apparently had intimate contact with defendant, having driven with him to Red Bluff from San Bernadino and spent the night in his motel room.[7] As in Lissauer, the stop of defendant herein was justified for purposes of investigation. In contrast, however, the search of defendant's van did not occur until defendant himself provided the probable cause.

Admissibility of Defendant's Statement

After the stop of his van was effected, defendant told the police they should check the girls because they had drugs too. Defendant contends this statement is fruit of the poisonous tree (Wong Sun v. United States, supra, 371 U.S. 471 [9 L.Ed.2d 441]) and therefore inadmissible. For the reasons set forth above this contention is without merit.

Defendant argues his statement is inadmissible because it was made before he had received any Miranda

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[7] On the evening of October 22 to 23, Carla, Boyd and defendant stayed in one room.

warnings,[8] at a time when he was not free to leave, and it was elicited in response to comments made by Lt. Sisneros. We disagree.

The Miranda Court held that a suspect must be warned of certain rights before the police undertake interrogation and that those rights must be waived in order for an interrogation to take place. The giving of the warnings and the waiver requirement are based on a presumption against the relinquishment of constitutional rights. (Miranda v. Arizona, supra, 384 U.S. at p. 475 [16 L.Ed.2d at p. 724].) However, the Miranda requirements are simply meant as a procedural guarantee and are not required by the constitutional provision itself. (Michigan v. Tucker (1974) 417 U.S. 433, 445-446 [41 L.Ed.2d 182, 193-194].) Consequently, a violation of Miranda is not synonymous with a violation of the voluntariness standard. (Id.; Oregon v. Elstad (1985) 470 U.S. 298, 309 [84 L.Ed.2d

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[8] Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694].

222, 232].) Hence, the failure to warn defendant under Miranda does not automatically result in suppression.

Miranda requires police interrogation. Interrogation includes both actual questioning and words or actions the police should know are reasonaly likely to elicit an incriminating response. (Rhode Island v. Innis (1980) 446 U.S. 291, 300-302 [64 L.Ed.2d 297, 307-308].) Defendant made his statement after he was advised of the purpose of the stop. No intervening comments were made by either Sergeant Baer or Lt. Sisneros. Even if defendant's statement was "in response" to his being informed of the purpose of the stop, to search his van, it cannot be said his statement was elicited by what was no more than a legitimate explanatory comment by the police. Reviewing the uncontradicted facts surrounding defendant's statement we conclude the trial court properly determined the statement was admissible. (People v. Jiminez (1978) 21 Cal.3d 595, 609.)

Admission of Boyd's Hearsay Statement

Although Cheryl Boyd testified at the preliminary hearing, she did not testify at trial. Instead, Sergeant Baer testified to Boyd's statements to him that there were drugs in the van. Defense counsel objected on the basis of hearsay and relevancy. The objections were denied and the statements admitted to explain Baer's subsequent actions. In ruling the statements admissible, the trial court instructed the jury the statements were admitted for this limited purpose only and not for the truth of the matter asserted.[9]

Defendant contends the testimony is not admissible as an exception to the hearsay rule, and that even if it is admissible hearsay it is irrelevant evidence offered to prove a fact not in dispute. He further contends the admission of this evidence through Baer denied him the right to confront Boyd, the accusing witness. The People classify this

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[9] The court instructed the jury: "Ladies and gentlemen, the testimony will come -- the statement will come in, it is hearsay, it is admitted under an exception, it is not admitted for the proof, for the truth of the fact, it's admitted simply to show why the officer did what he did next."

evidence as "a classic example of the nonhearsay use of a declarant's statement as imparting information to a hearer but not offered to prove the truth of the facts stated in the statement".[10]

The hearsay rule excludes evidence of a declarant's statement only when it is offered to prove the truth of the matter asserted. If the statement is offered for another purpose it is not hearsay; however admissibility depends upon principles of relevancy. Thus evidence of a statement offered for a nonhearsay purpose that is irrelevant must be excluded under Evidence Code section 350.[11] (People v. Armendariz (1984) 37 Cal.3d 573, 585.)

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[10] Because Baer's state of mind did not tend to prove or disprove any issue in the case, the People's reliance on this nonhearsay purpose is misplaced. An extrajudicial statement of this nature is relevant only when the hearer's state of mind is relevant. Hence, in People v. Duran (1976) 16 Cal.3d 282, 295, the extrajudicial statement served to explain why the hearer fled the scene of the crime. In People v. Roberson (1959) 167 Cal.App.2d 429, 431, it bolstered the hearer's contention he did not sell drugs to a known narcotic agent. And in People v. King (1956) 150 Cal.App.2d 1, 9, it established probable cause to search.

[11] Evidence code section 350 provides: "No evidence is admissible except relevant evidence."

Boyd's statement to Baer may well have explained why Baer acted as he did in following defendant's van. However, Baer's state of mind at that time had no bearing on the issue at trial. Accordingly, the court's reason for admitting the evidence did not justify its ruling. (Ibid.) The California Supreme Court has cited People v. Scalzi (1981) 126 Cal.App.3d 901, as illustrative of the gap in the trial court's reasoning. (People v. Armendariz, supra, 37 Cal.3d at p. 586.) There, the defendant was found by police at a residence with drugs and packaging equipment and he was arrested and charged with conspiracy to sell controlled substances. While the officers were at the residence a telephone call was intercepted. The caller asked if "John had gotten it bagged up." The defendant, whose name was John, did not live at the house and claimed he was there to borrow money.

The trial court ruled the officer's testimony about this phone call was admissible for the nonhearsay purpose of showing the officer's reason for arresting the defendant.

The Court of Appeal held it was error to admit the testimony because the asserted nonhearsay purpose was irrelevant. "[The officer's] reaction or state of mind after the telephone conversation and any actions he took based thereon shed no light on any issues presented in the case. Anything [the officer] did in response to the telephone conversation was irrelevant." (People v. Scalzi, supra, 126 Cal.App.3d at p. 907, emphasis in the original.)

Similarly, Baer's state of mind after hearing Boyd's statement was not an issue at the trial herein. Defendant's guilt or innocence of the transporting charge was disputed, not how he came to be arrested.[12] Nonetheless, we

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[12] Defendant relies, in part, on Moore v. United States (1976) 429 U.S. 20 [50 L.Ed.2d 25] for the proposition that admissibility of Boyd's hearsay statement deprived him of the right of confrontation. Moore involved admission of an informant's out-of-court declaration that an apartment (where heroin was found) was the defendant's. The trial court expressly relied on the statement in finding the defendant was the tenant of the apartment and in adjudging his guilt. The United States Supreme Court reversed holding the statement was inadmissible hearsay, the introduction of which deprived the defendant of the opportunity to cross-examine the informant as to the factual basis for the statement, his recollection, or credibility. In the instant case, however, the statement at issue was admitted for a nonhearsay purpose. Therefore, Moore is not instructive.

conclude the error was harmless. No prejudice could have flowed from the testimony regarding Boyd's statement since other evidence established the presence of the contraband in defendant's van. Additionally, defendant's statement indicated awareness of the presence of drugs in the van.

Instructional Error

Defendant argues the trial court was required to instruct the jury, sua sponte, on the definition of an accomplice and the rules applying to accomplice testimony. Specifically, defendant asserts it was a question of fact for the jury to decide whether Wiles was an accomplice. Therefore, the jury should have been instructed to view his testimony with distrust (CALJIC No. 3.18) and that it could not convict on the uncorroborated testimony of an accomplice (CALJIC No. 3.11). The People assert Wiles is not an accomplice and the duty to instruct did not arise.

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial

in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; People v. Gordon (1973) 10 Cal.3d 460, 466.) However, the witness must have "'guilty knowledge and intent with regard to the commission of the crime. [Citation.]'" (People v. Gordon, supra, at pp. 466-467.) "[W]here the facts are in dispute as to the knowledge and intent of the asserted accomplice, the witness' liability for prosecution is a question of fact for the jury." (Id. at p. 467.)

Wiles testified he was not aware there were drugs in the van during the drive from San Bernadino, nor was there any discussion about drugs. After the four arrived at the motel, Wiles went to his room alone. At about 7:00 the next morning he stopped at defendants's room with the two women and saw defendant was tied to the bed post, asleep. About five minutes later, while breakfasting alone, he saw defendant's van go by. Wiles next saw defendant after Sergeant Baer's arrival.

Prior to leaving the motel, defendant removed luggage

from the van. Wiles assumed it belonged to the two women. He did not recall seeing the green duffel bag and denied it was his. Wiles denied knowledge there was contraband in the van, although he admitted he had smoked some marijuana with the women, which Carla provided. Finally, he testified he wore a size 32 shorts.

In the instant case, the facts as to Wiles' knowledge and intent are not in dispute. No evidence was presented from which the jury could properly conclude Wiles was subject to prosecution for the same offenses with which defendant was charged.[13]

Defendant contends the trial court did not properly instruct the jury on the elements of the offense of transportation; specifically, that knowledge of the presence

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[13] Originally, Wiles and defendant were jointly charged. The charges against Wiles were dismissed on the Friday preceeding trial. While it is true that a previously acquitted codefendant may be an accomplice for purposes of instructing the jury (People v. Gordon, supra, 10 Cal.3d at p. 467), in this case there is no evidence with respect to Wiles other than his mere presence in the van, which does not suffice to make one an accomplice. (People v. Matta (1976) 57 Cal.App.3d 472, 487.)

of the contraband is an element of the crime.[14] We disagree.

"'Knowledge by the defendant of both the presence of the drug and its narcotic character'" is an essential element of the offense of transportation. (People v. Rogers (1971) 5 Cal.3d 129, 133, quoting Rideout v. Superior Court (1967) 67 Cal.2d 471, 474.) Pursuant to CALJIC 12.02, the jury was instructed the elements necessary to prove the crime of transporting are (1) a person transports methamphetamine (count I) or cocaine (count II), (2) with the knowledge it is a controlled substance, and (3) the amount of the substance transported was a useable

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[14] Defense counsel proffered a jury instruction that included the element of knowledge of the presence of the contraband, however, the record establishes the requested instruction was withdrawn and the People's version given by stipulation. Defendant claims "defense counsel's 'acquiescence derived from neglect, mistake, or inattention rather than from a deliberate tactical choice . . . . (People v. Barraza (1979) 23 Cal.3d 675, 684)'" and thus is not invited error. Defendant is correct since defense counsel did not deliberately and expressly withdraw the proffered instruction for specific tactical reasons. (People v. Coleman (1988) 46 Cal.3d 748, 781, fn. 26; People v. Graham (1969) 71 Cal.2d 303, 319.)

quantity.[15] Thus, although the jury was not separately instructed defendant had to be aware of the presence of the drugs in his van, it was instructed it must find defendant knowingly transported the contraband.

The defense in this case was defendant lacked the requisite knowledge of the presence of the contraband. He challenges the effect of the prosecutor's closing argument wherein he stated: ". . . Such person had knowledge of its nature as a controlled substance, that's the second element. The nature of the cocaine, each one of us knows what cocaine is. The nature of the substance, ladies and gentlemen, not the presence of the substance, but the nature of the substance . . ."

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[15] The jury was separately instructed as to both counts as follows: "In order to prove such crime, each of the following elements must be proved: [¶] 1. A person transports methamphetamine, a controlled substance. [¶] 2. Such person has knowledge of its nature as a controlled substance. [¶] 3. That the substance transported was in an amount sufficient to be used as a controlled substance." This instruction has since been revised to specifically delineate the requirement the person had knowledge of both the presence of the substance and its nature as a controlled substance. (CALJIC No. 12.02, 1989 revision.)

The argument of the prosecutor is a misstatement of the law; however, the jury was properly instructed on the elements of the offenses with which defendant was charged. Furthermore, defense counsel argued actual knowledge of the presence of the contraband was a necessary requisite for proving the elements of the offenses. Therefore, the issue was before the jury. Finally, defense counsel neither objected nor sought a curative admonition and the error of the argument, if any, is waived. (See People v. Bell (1989) 49 Cal.3d 502, 535, 547.)

Sufficiency of the Evidence

Defendant asserts there is insufficient evidence to support his convictions.

When reviewing a judgment of conviction an appellate court must determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 576-578.) To make this determination the appellate court views the evidence in the light most favorable to respondent and

presumes in support of the judgment the existence of every fact which the trier of fact could reasonably deduce from the evidence. (Id. at pp. 576-577.)

Prior to leaving the motel, defendant removed the luggage belonging to the two women but not the duffel bag in which the contraband was found. The bag itself was found behind the driver's seat, and defendant was driving the vehicle when it was stopped. When defendant was informed of the purpose of the stop of his van, he told the police the women also had drugs. A useable quantity of contraband, found in four containers, was recovered from defendant's van.[16] We conclude there was sufficient evidence to find defendant guilty of transportation of methamphetamine and cocaine beyond a reasonable doubt.

Sentencing Error

Consecutive to the sentence imposed for count II, the

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[16] It was stipulated the containers held a useable quantity of both methamphetamine and cocaine.

court imposed an additional three year term (two years stayed) under section 11370.2, subdivision (a) for a conviction for distribution under Title 21, United States Code, section 841, subdivision (a) (1). Defendant correctly contends the sentence enhancement based on the prior federal conviction in Alaska must be stricken.

In 1988, at the time of the within offense, section 11370.2 provided: "(a) Any person convicted of a violation of Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment." The statute does not provide for enhancement of a conviction for an offense committed under the laws of another state or under federal law. Therefore, the enhancement on the basis of the federal

conviction obtained in Alaska was erroneously imposed and must be stricken.

Defendant was sentenced to concurrent terms for transportation of cocaine and methamphetamine. We requested supplemental briefing (Gov. Code, § 68018) on the question whether the concurrent term imposed on count I should be stayed pursuant to Penal Code section 654.

In In re Adams (1975) 14 Cal.3d 629, the defendant was prosecuted for simultaneous transportation of five different kinds of illegal drugs (benzedrine, seconal, marijuana, heroin, and pantopan), and one count of selling benzedrine. For sentencing purposes the trial court grouped three counts under one Health and Safety Code section (sale of benzedrine and transportation of seconal and benzedrine) and made their sentences run concurrently. The sentences of the three remaining transportation charges (marijuana, heroin, pantopan) were further grouped and the sentences concurrently imposed.

The concurrent sentences for each group were ordered to run consecutively. The Adams court modified the judgment to stay execution of the sentences for the offenses of transportation of seconal, benzedrine, marijuana, and pantopan, pending service of consecutive sentences on the offenses of sale of benzedrine and transportation of heroin. The court reasoned that under Penal Code section 654, which prohibits multiple punishment of an act or omission punishable in different ways by different statutory provisions, only one act of transportation took place as the entire transaction constituted an indivisible course of conduct. (In re Adams, supra, 14 Cal.3d at pp. 636-637; accord People v. Kirk (1989) 211 Cal.App.3d 58, 60-61.)

The People's attempt to distinguish Adams is not persuasive. Based in part on testimony adduced at the preliminary hearing it is asserted there is evidence to support an implied finding defendant transported various drugs both for the purpose of sale and personal use. The People thus contend the act of transportation herein was

motivated by more than one criminal purpose.[17]

The evidence adduced at trial was that a total of four bags and one container of powder substance, and one container of marijuana (for which defendant was not prosecuted) were seized. It was stipulated the amount of cocaine and methamphetamine was a useable quantity - this being a necessary element of the offenses of which defendant was charged and convicted. Under these circumstances "it would be unreasonable to fragment [the] single objective [of transporting] into [two] separate objectives, namely, to transport [methamphetamine], to transport [cocaine] . . . . Instead, the entire transaction should reasonably be viewed as constituting an indivisible course of conduct . . . ." (Adams, supra, 14 C.3d at p.

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[17] Defendant was originally charged with possession for sale of methamphetamine (§ 11378) and cocaine (§ 11351) (counts I and II) and possession of marijuana (§ 11377, subd. (a)) and cocaine (§ 11350) (counts III and IV). Defendant's motion to dismiss (Pen. Code, § 995) was granted on the possession for sale charges and he was subsequently charged by information with transporting. Contrary to the People's implication we presume defendant's sentence is not based on evidence which was deemed insufficient to bind him over on charges of possession for sale.

635.) The evidence in the instant case is such that the sentence for count I must be stayed under Penal Code section 654 pending service of the five-year term on count II.

DISPOSITION

The sentence on count I is stayed and the enhancement for the prior conviction under federal law is stricken. The trial court is to amend the abstract of judgment accordingly. In all other respects the judgment is affirmed.

_____RAYE_____, J.

We concur:

_____CARR_____, Acting P.J.

_____MARLER_____, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

DEC 02 1991

COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, CLERK
By _____, Deputy

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff and Respondent

vs.

3 Crim. C007967
Tehama 4663

RONALD KEITH MILLER
Defendant and Appellant

By the Court:

Appellant's petition for rehearing is denied.

Dated: December 2, 1991

CARR, Acting P.J.

- -

cc: See Mailing List

APPENDIX B

Third Appellate District No. C007967
S024189

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
FEB 11 1992
ROBERT WANDRUFF CLERK
Deputy

THE PEOPLE, Respondent

v.

RONALD KEITH MILLER, Appellant

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX C